IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

SMITH-DUGAN, INC. V. DUGAN

SMITH-DUGAN, INC., APPELLEE,
V.
WILLIAM M. DUGAN, ALSO KNOWN AS MARVIN W. DUGAN, APPELLANT.

Filed April 17, 2012. No. A-11-653.

Appeal from the District Court for Greeley County: MARK D. KOZISEK, Judge. Affirmed.

Steven M. Curry, of Sampson, Curry & Twiss, P.C., for appellant.

Marvin L. Andersen, of Bradley, Elsbernd, Andersen, Kneale & Mues Jankovitz, P.C., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

William M. Dugan, also known as Marvin W. Dugan, appeals the decree of the district court finding that he wrongfully obstructed the flow of surface waters from the property of Smith-Dugan, Inc., onto his own property and requiring him to remove the embankments obstructing the waterflow. Because surface waters entered William's property through two separate natural drainageways, he was not entitled to defend against the flow of surface waters at those points. And because his actions caused continuing and permanent injury to Smith-Dugan, the district court properly issued an injunction ordering removal of the embankments. Accordingly, we affirm the decree of the district court.

BACKGROUND

William owns a quarter section of land west of Greeley, Nebraska, that is legally described as "the Northwest Quarter of Section Eleven in Township Eighteen North, Range Eleven West of the 6th P.M., Greeley County, Nebraska."

The land immediately to the west of William's property is owned by Smith-Dugan. This property is legally described as "the Northeast Quarter of Section Ten in Township Eighteen North, Range Eleven West of the 6th P.M., Greeley County, Nebraska."

Throughout the district court proceedings and in the district court's decree, William's property was referred to as "parcel 1" and Smith-Dugan's property was labeled "parcel 2." Accordingly, we also adopt this terminology.

On the eastern edge of parcel 2, there is a private dirt road that extends about three-fourths of the length of the quarter section. This driveway connects the county road running along the northern edge of parcels 1 and 2 to a building site located in the southern portion of parcel 2. The driveway veers off to the west at a point approximately halfway between the county road and the southern boundary of parcels 1 and 2. A barbed wire fence runs along the entire length of the property line between parcels 1 and 2. Until the driveway veers to the west, this fence lies immediately to the east of the driveway. There is an old gate in the fence slightly to the north of the curve in the driveway.

Smith-Dugan first initiated proceedings against William in the district court for Greeley County in 2007, after he performed dirtwork which created an embankment of disputed height in at least two places along the fence between parcels 1 and 2. Smith-Dugan alleged that the embankment prevented the natural drainage of surface waters from parcel 2 to parcel 1, resulting in the driveway on parcel 2 becoming "nearly impassable for significant periods of time" due to the pooling of water. In the initial complaint and two amended complaints, Smith-Dugan raised numerous causes of action based on William's creation of the embankment, including trespass, violation of express and prescriptive easements, and breach of contract. William also raised several counterclaims.

However, all pleadings were superseded by a pretrial order issued by the district court in January 2011. This pretrial order limited the issues for trial to those legal and factual issues specifically identified in the order. The issues relevant to this appeal were, consolidated and restated, (1) what the parties' respective rights were in regard to surface waters flowing between parcel 2 and parcel 1, (2) whether either party violated the other's rights as to surface waters, (3) whether either party was damaged, and (4) what remedy was appropriate if there was damage. The pretrial order also recited the stipulations agreed to by the parties, including a stipulation that the type of water at issue was surface water.

A trial on the identified issues was held over 2 days in March and April 2011. Per stipulation of the parties, the court viewed parcels 1 and 2 in the presence of the parties and their attorneys at the conclusion of the first day of trial.

At trial, Gerald Dugan, president of Smith-Dugan, testified to the dirtwork he believed William had performed along the fence dividing parcels 1 and 2 sometime between 2005 and early 2007. According to Gerald, William altered the topography of the land along the border between parcels 1 and 2 in three different ways. First, William allegedly created a "dike" approximately 3 feet in height by removing trees along the fenceline and shoving dirt up against the fence. Second, William ostensibly removed a small hill in the driveway on parcel 2. Finally, he supposedly removed an embankment that Smith-Dugan had built to force surface water from the southern portion of parcel 2 to flow east onto parcel 1.

David Dugan, William's son, testified to performing some dirtwork along the fence on his father's behalf. David said that he pushed dirt from parcel 1 into the fenceline to create "a little windrow of dirt about a foot high so the water would go north instead of cutting through the field." According to David, he made only a small embankment in two places along the fence: approximately 60 feet south of the county road and at the gate. He denied performing any other dirtwork on parcel 1, removing any trees, or entering onto parcel 2 to work on the driveway.

William did not testify at trial, but Smith-Dugan read a portion of his deposition into evidence, in which he admitted to removing trees along the fenceline. The portions of the deposition read also suggested that William admitted to performing some dirtwork on the driveway. When asked how far south he did dirtwork "on the lane," William did not deny performing dirtwork on the driveway, but responded, "Just right there. No further. Right about in the middle there. There's just a high spot there."

Smith-Dugan presented evidence of the damaging effects of William's dirtwork. Gerald personally testified to the changes in surface waterflow from parcel 2 to parcel 1 and provided numerous photographs of the conditions created on parcel 2 as a result. He stated that prior to William's dirtwork, surface waters from parcel 2 flowed east onto parcel 1 and the driveway was passable "no matter what the conditions were." But, according to Gerald, after William's dirtwork, the driveway became almost unusable due to water that "puddled" in the driveway. Gerald also indicated that the dirtwork created problems with mud and snow accumulation. Gerald's testimony was that as a result of the bad road conditions, the driveway became unusable every year on a regular basis.

Other witnesses also spoke to the effects of William's dirtwork on the flow of surface waters from parcel 2 and parcel 1. The vice president of Hook Brothers, a company that provides excavating and dirt-moving services, testified that he had observed the drainage of surface water while surveying parcel 2. His observation was that surface waters from parcel 2 drained north and east onto parcel 1 and that this flow was interrupted by the higher ground along the fenceline. Additionally, in the portions of William's deposition read into evidence, William admitted that David's actions of pushing dirt into the fenceline prevented water from flowing from parcel 2 to parcel 1.

Finally, Michael Jess, former director of the Nebraska Department of Water Resources and a consultant on drainage issues and water rights, testified regarding water drainage on parcels 1 and 2. He stated that parcels 1 and 2 are composed of "sandy soils and would be far more prone to vertical infiltration than they would to overland runoff" and that, consequently, he would not expect water to pool on the surface. However, he offered two reasons why water would pool on the driveway. First, he testified that pooling could result if water was not being absorbed into the ground quickly enough, perhaps due to the ground's being frozen or permeability being reduced by frequent vehicle traffic. Second, Jess stated that water could be pooling because it was not able to flow across ground to another location. He noted that "there would be a natural tendency, if there is overland runoff, for the water, at least on a portion of [parcel 2], to flow eastward toward [parcel 1]."

On June 27, 2011, the district court filed a decree permanently enjoining William "from diverting or obstructing the flow of the surface waters from [parcel 2] onto and across [parcel 1] at the gate and along the north 500′ of the driveway from the county road to the south" and

ordering him to remove the dirt embankment at those two locations. The court specifically found that those two locations corresponded with natural drainageways, that William had unlawfully interfered with those drainageways by "rolling dirt" into the fenceline, and that the dirt ridge made water pool on the driveway "in a continuing manner resulting in permanent injury" to Smith-Dugan. The district court overruled, denied, and dismissed all other claims and counterclaims in the case.

William subsequently filed a motion for new trial, arguing that the facts of the case did not support the court's finding of natural drainageways. The district court orally overruled the motion at a hearing on July 20, 2011, and issued a corresponding written order on July 22.

William timely appeals.

ASSIGNMENTS OF ERROR

William alleges, reordered and restated, that the district court erred (1) in finding that a natural drain, depression, or swale existed on the east boundary of parcel 2; (2) in ruling that William was not entitled to defend himself, by embankment, dike, or otherwise, against surface waters flowing from parcel 2; and (3) in ordering an injunction.

STANDARD OF REVIEW

An action for injunction sounds in equity. *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Id.* But where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

ANALYSIS

Before addressing William's assignments of error, we first recall the rules governing a landowner's rights as against surface waters flowing onto and over his property.

The general rules applicable to a landowner regarding surface waters flowing within the confines of his or her property have been stated as follows:

> [T]he owner of land is in the position of an owner of all surface waters which fall or arise on it, or flow upon it. He may retain them for his own use. He may change their course on his own land by ditch or embankment, but he cannot divert their flow upon the lands of others except in depressions, draws, swales, gulches, or other drainways through which such waters were wont to flow in a state of nature.

Nichol v. Yocum, 173 Neb. 298, 307, 113 N.W.2d 195, 201 (1962). This right of a landowner to drain surface waters from his property through natural drainageways is facilitated by a corresponding rule that "[t]he flow of water in a natural drainageway cannot be interfered with to the injury of a neighboring proprietor." *Romshek v. Osantowski*, 237 Neb. 426, 436, 466 N.W.2d 482, 491 (1991).

From the perspective of the adjoining landowner onto whose land surface waters flow (also known as the lower proprietor), the law identifies a bifurcated rule. Consistent with the

aforementioned rule regarding natural drainageways, "as against the rights of an upper proprietor, a lower proprietor cannot obstruct surface water which is moving in a natural drainage channel or depression." *Gruber v. County of Dawson*, 232 Neb. 1, 8, 439 N.W.2d 446, 452 (1989). But so long as surface waters are not flowing in a natural drainageway, they "may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability if it is necessary and done without negligence." *Id.* at 9, 439 N.W.2d at 453. The Nebraska Supreme Court has explained the reasoning behind this pair of rules as follows:

> The rule that water flowing in a natural drainageway may not be dammed, repelled, or diverted without liability for damages caused thereby arises from the theory that the lower estate, through which the natural drainageway runs, is under a natural servitude to receive the water flowing along the drainageway from the higher estate. . . . The lower estate is not, however, under a natural servitude to receive diffused surface waters which have not found their way into a natural drainageway, since the physical attributes of the land do not make the servitude apparent to a prospective purchaser. . . .
>
> In essence, diffused surface waters are treated as a common enemy (subject to the rule requiring necessity and absence of negligence) until they are channeled into a natural drainageway, at which point the notion of a natural servitude comes into play, prohibiting obstruction of the drainageway to the detriment of others.

Nu-Dwarf Farms v. Stratbucker Farms, 238 Neb. 395, 400, 470 N.W.2d 772, 777 (1991).

In the instant case, the surface waters at issue flowed from parcel 2 toward parcel 1. Thus, to adjudicate the parties' respective rights regarding those surface waters, we must determine whether they were diffused or flowed through a natural drainageway as they crossed from parcel 2 to parcel 1. We now turn to this question.

Finding as to Natural Drainageways.

William's first assignment of error focuses on the district court's factual finding that two natural drainageways existed on the east boundary of parcel 2. In so finding, the court explained, "The evidence shows that the waters, on occasion, concentrate in force and volume and form a drainageway onto and across [parcel 1] at the location of the gate and further to the north at the 2030′ elevation on the topographical map." Upon our de novo review of the evidence, we agree that natural drainageways exist at those two locations.

A natural drainageway is formed when diffused surface waters concentrate and accumulate in volume so as to lose the characteristics of diffused surface water and flow into a well-defined course, whether it be a natural depression, swale, ditch, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land. *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991). The defining characteristic of a drainageway "is not whether water is present in the drainageway at all times," but that "water [runs] consistently on the same path" through the depression, swale, ditch, or draw. *Id.* at 437, 466 N.W.2d at 491.

William ineffectively argues that a natural drainageway must have "a bed and banks with sides, as opposed to [being] merely a hollow or ravine which in ordinary seasons is destitute of water and dry." Brief for appellant at 21. The Nebraska Supreme Court has held that a natural drainageway must demonstrate some of the attributes of a watercourse, which attributes include a bed, banks, and sides. See, *Shotkoski v. Prososki*, 219 Neb. 213, 362 N.W.2d 59 (1985); *Grint v.*

Hart, 216 Neb. 406, 343 N.W.2d 921 (1984); *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982). But a natural drainageway "does not have to have all of the attributes of a watercourse," only some. *Romshek v. Osantowski*, 237 Neb. at 435, 466 N.W.2d at 491.

> "'To constitute a water course, it must appear that the water usually flows in a particular direction; and by a regular channel, having a bed with banks and sides; and (usually) discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously, but it must have a well-defined and substantial existence.'"

Mader v. Mettenbrink, 159 Neb. 118, 127, 65 N.W.2d 334, 342 (1954) (*quoting Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406, 56 N.W. 946 (1893)). Because we find below that the two flows of surface water from parcel 2 to parcel 1 possess other attributes of a watercourse, such as a well-defined and regular course, it is not necessary that they also possess a bed, banks, and sides to be legally considered natural drainageways. With this understanding, we now turn to the evidence regarding each of the two drainageways identified by the district court in the case at bar.

The testimony at trial showed that water flowed from parcel 2 to parcel 1 at a point near the northern end of the driveway prior to William's dirtwork. During Gerald's testimony, he identified exhibit 33--a photograph taken in March 2007 after the dirt work was complete--as depicting the location where surface water used to drain from west to east across the driveway before it was blocked by the embankment. In the photograph, a path of wet soil extended away from the driveway in a southeasterly direction across parcel 1. This path was situated in the middle of an area of slightly lower elevation than the land to the north and south. Gerald testified that this photograph was taken at a point approximately 150 to 200 feet south of the county road.

David also testified that he formed a windrow "where [water] broke through by the road." He later identified that he did this dirtwork approximately 60 feet south of the county road, although he did not indicate the length of the windrow he created. He also said that "you can see where the water's [sic] went down through that spot over the years and cut it out." This testimony that the water "broke through" and "cut" a path indicates not only that the surface water at that point had a well-defined course--which was already evident from exhibit 33--but also that it was concentrated and flowed with some velocity.

The existence of a well-defined flow of surface water across the northern end of the driveway was also proved by other photographic evidence. The aerial photographs from February 2007 showed a defined path extending in a southeasterly direction from a point near the northern end of the driveway to a small stream in the eastern half of parcel 1. In the photographs, this path was visibly filled with water. A rough measurement based on the section lines in the photographs reveals that this path of water intersected the property line approximately one-sixteenth of the way between the north and south boundaries of parcel 1. Since parcel 1 is a quarter section, and thus a known distance, it necessarily follows that the waterflow crossed the driveway approximately 115 feet south of the county road.

Aerial photographs dating back to 1951 showed an area of darkened ground extending from a point along the driveway across parcel 1 in the same southeasterly direction as the water in the 2007 photographs. In the photographs, this darkened area looked similar to the natural drain running across the western portion of parcel 2. Since the natural drain in parcel 2 was

clearly identified as such in the photographs at trial, the darkened ground appearing in the northwestern corner of parcel 1 also shows a natural drainageway. This drainageway was clearly visible in the aerial photographs taken in 2003, 1993, and 1957. It was less visible, although still discernible, in the aerial photographs taken in 1969, 1963, and 1951.

From the topographic map entered into evidence at trial, we can see that this recurring waterflow in the northern region of parcels 1 and 2 corresponded to an area of lower elevation. On the map, there is a small "finger" of ground of lower elevation surrounded to the north, south, and west by ground of higher elevation. According to the scale on this map, the lower elevation begins between 100 and 150 feet south of the county road and continues for approximately 200 feet before again rising to a higher elevation. This map was based on elevations taken in 1954. The topography of parcels 1 and 2 thus indicates that a natural depression or valley has existed along the property line slightly south of the county road for many years.

The district court observed this natural depression or valley near the north end of the driveway when it viewed the property. Upon returning from its visit to parcels 1 and 2, the district court generally noted that it was able to "confirm the various depictions that are shown on the exhibits that have been received." And in the decree, it laid out specific observations from the viewing. In regard to the area at the northern end of the driveway, the court stated:

> The ridging in this area is quite evident. . . . The ridging corresponds to the 2030′ elevation of the topographical map . . . where this lower elevation ground abuts the division fence line. The ridge is readily apparent when viewing the property from the county road looking southwest. It is in this area where there is a marked indication of surface water flow to the south east . . . .

The "2030′ elevation" to which the court referred is the natural depression or valley we identified above on the topographical map. The court later found that a natural drainageway existed at precisely that location.

When a lower court views the property at issue in a case and sets out its findings reached as a result of the viewing, we may give weight to those findings. See *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991). Accordingly, we give weight to the district court's observations of the property in the instant case and specifically highlight that its observations confirmed the photographic evidence presented at trial.

William questions the finding of the district court as to the northern drainageway because "[t]here was no finding that a drainageway existed on [parcel 2]" and because the injunction "did not restrict itself to the 2030′ elevation but enjoined [William] from obstructing surface waters along the fence line for a distance of 500 feet from the [c]ounty [r]oad south." Brief for appellant at 21. These arguments ignore the precise language of the district court's finding regarding the northern drainageway. First, the court found that the water formed a drainageway "onto and across" parcel 1. The use of the preposition "onto" indicates that the drainageway began on parcel 2 and subsequently entered parcel 1. Thus, contrary to William's contention, the court did find that a drainageway existed on parcel 2. Second, the court's reference to a distance of 500 feet in the injunction does not reflect that the court "determined the 'natural drain or depression' was in fact 500 feet wide," as William argues. Brief for appellant at 21. Rather, the court pinpointed the location of the northern drainageway by referring to the "2030′ elevation" on the

topographical map. The court's decision to require the removal of the embankment for up to 500 feet does not undermine its precise holding regarding the location of the northern drainageway.

Upon our de novo review of the evidence and testimony at trial and giving appropriate weight to the district court's personal observation of the property, we find that prior to William's dirtwork, a natural drainageway crossed the property line between parcels 1 and 2 at a point approximately 100 to 200 feet south of the county road. The surface waters in this drainageway flowed in a well-defined path that was consistent over the years and that corresponded to a natural depression or draw, the remnants of which path the district court was still able to observe in 2011. The district court did not err in concluding that a natural drainageway existed in that location.

Turning now to the southern drainageway, we note that three different witnesses testified at trial that water flowed from west to east across the fenceline at the location of the gate before William built the dirt embankment. Gerald identified exhibit 24--a photograph of the driveway adjacent to the gate--as showing the location where water used to flow from west to east across the driveway before William "diked it." Similarly, the vice president of Hook Brothers testified that he identified a "natural flow" where "the water seemed to want to cross the fence road." When asked to identify the location of this natural flow, he stated that exhibit 22--another photograph of the road adjacent to the gate--represented the "general proximity." Finally, David stated that the second place he blocked the flow of surface water was "at the gate."

This testimony of a natural waterflow from parcel 2 onto parcel 1 at the location of the gate was supported by the photographic evidence presented at trial. From the various photographs of the gate taken in 2007, it appeared that water had a tendency to collect in the area immediately to the west of the gate as opposed to other parts of the driveway. This was despite deep tracks in the driveway encouraging water to travel in a north-south direction along the fence. In the photograph of the gate taken facing east, it was apparent that this pooled water on the west side of the gate was blocked by the dirt embankment and corresponded to a path of moist dirt extending across parcel 1.

The darkened path of ground extending from the gate to the east was also visible in the aerial photographs from 2007. The path did not appear to be filled with water at the time of the photographs, but it was much darker than the surrounding ground, indicating the movement of at least some surface water along the path. Although the gate was not visible in the aerial photographs, the darkened path entered parcel 1 at a point near a row of trees bordering the building site on parcel 2. From the photographs of the gate taken from the ground, we can place the location of the gate slightly to the north of a row of trees bordering the building site on parcel 2. Thus, we can determine that the darkened path in the aerial photographs entered parcel 1 at the gate. From there, it flowed in a northeasterly direction and connected up with the drainageway previously identified to the north. At that point, both paths continued in a southeasterly direction until they flowed into the small stream in the eastern portion of parcel 1.

The historical aerial photographs also indicated a flow of water extending from a point to the north of some trees near the building site across parcel 1. As was the case with the north drainageway, the darkened path visible in these aerial photographs resembled the large drainageway identified as such in the western portion of parcel 2. Thus, we conclude from the

aerial photographs taken in 1993, 1969, 1963, and 1957, that a small but well-defined drain has crossed from parcel 2 to parcel 1 in the vicinity of the gate for many years.

The district court made few specific observations regarding the drainageway near the gate, but it did state that water pools "at the bottom of the hill where the gate in the division fence is located" and that the pooled waters "flow generally to the east and eventually find their way to Spring Creek." The court also noted that its visit to the property revealed that the gate was at the bottom of a hill and that the ground to the south was higher in elevation. Later in the decree, the court explicitly found that "waters, on occasion, concentrate in force and volume and form a drainageway onto and across [parcel 1] at the location of the gate." As before, we give appropriate weight to these observations of the district court. See *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991).

William challenges the finding of a natural drainageway at the gate because the court "could not identify the location of any drain or depression" when viewing the property. Brief for appellant at 21. This argument takes the findings of the court out of context, implying that the court's statement that "[n]o readily discernable drainway was observed" applied to the entire property, when in fact it only pertained to "a diversion ditch on the south part of the property passing by the old building [site], grain bins[,] and feedlot." The court did observe a drainageway near the gate and explicitly stated so in its decree.

William also challenges the finding of a drainageway near the gate by suggesting that it is a manmade diversion. There was testimony that Smith-Dugan built a ditch to channel surface waters from the south half of parcel 2 across to parcel 1, but William's suggestion that this diversion occurred at the gate is a clear misstatement of the evidence at trial. The testimony to which William directs us regarding the manmade diversion included no mention of the gate. Rather, in that portion of Gerald's testimony, he identified the location of the manmade diversion as "[t]hree single posts further to the south" than "the third set of double posts" in exhibit 22. The first two sets of double posts in this photograph represented the gate. The third set of double posts was much farther to the south, clearly placing the diversion in a different location than the gate.

Because the testimony and photographic evidence at trial indicated that the surface waters flowed from parcel 2 to parcel 1 at the location of the gate in a well-defined and regular path, we agree that a natural drainageway existed at the gate prior to William's dirtwork. The district court did not err in concluding that a natural drainageway existed at that location.

In conclusion, we find that natural drainageways crossed the property line between parcels 1 and 2 at the gate and at a point approximately 100 to 200 feet south of the county road prior to William's dirtwork. The district court did not err in so concluding. William's first assignment of error lacks merit.

William's Rights as Against Surface Waters.

Because we have established that natural drainageways existed at two points along the boundary between parcels 1 and 2, William's rights as against the surface waters flowing through those natural drainageways are clear. A natural drainageway must be kept open to carry water into streams, and, as against the rights of an upper proprietor, a lower proprietor cannot obstruct surface water which has found its way into and is moving in a natural drainage channel

or depression. *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985). William confesses in his brief that this is the rule in Nebraska when surface waters flow in a natural drainageway.

In arguing for his right to protect his land from surface waters, William highlights the testimony of Jess that heavy vehicle traffic along the driveway and over the building site on parcel 2 could have reduced the permeability of the soil and caused more runoff. William also emphasizes the evidence that Smith-Dugan performed its own dirtwork on parcel 2, which actions he claims "could have affected the drainage" of surface waters from parcel 2 to parcel 1. Brief for appellant at 23.

Even assuming, without deciding, that Smith-Dugan did perform dirtwork on parcel 2 that affected the flow of surface waters on parcel 2, there was no evidence, and William does not contend, that these actions changed the point at which the surface waters exited parcel 2. Under our case law, "an upper proprietor may change the course of surface water on his own land by ditch or embankment, provided that the upper proprietor does not alter the point at which the water exits his land." *Romshek v. Osantowski*, 237 Neb. 426, 440, 466 N.W.2d 482, 493 (1991). The upper proprietor is permitted to level the ground or perform other dirtwork which alters the course of surface waters "provided the water exited their land in the natural drainageway." *Id.* at 440, 466 N.W.2d at 493. Therefore, given our previous finding that the surface waters exited parcel 2 in natural drainageways, any activities by Smith-Dugan that might have altered the flow of surface waters within the confines of parcel 2 did not affect William's rights as to the surface waters flowing onto parcel 1 through those natural drainageways.

Even if Smith-Dugan performed its own dirtwork, under Nebraska case law, William was not entitled to defend against the surface waters moving through natural drainageways by obstructing their flow onto parcel 1. The district court did not err in reaching this legal conclusion. William's second assignment of error lacks merit.

Injunction.

Finally, William assigns error to the district court's decision to issue an injunction. He argues that Smith-Dugan failed to present evidence of irreparable damages and highlights that the court found that Smith-Dugan failed to meet its burden of establishing the amount of its damages.

While Smith-Dugan did fail to present any concrete evidence of monetary damages suffered from William's dirtwork, it did offer evidence of the nonmonetary harms resulting from William's actions. Gerald testified that the driveway, which was passable "no matter what the conditions were" prior to William's dirtwork, now becomes unusable on a regular basis due to snow accumulation, water pooling, and mud. He stated that these bad road conditions have occurred every year since 2007 and that his attempts to counteract these conditions through the addition of dirt, gravel, and rock have not made the lane passable. Gerald testified that he travels down the driveway to the building site on parcel 2 at least two times per day and that the road conditions resulting from William's dirtwork have thus caused trouble for him. The district court's visit to the property confirmed the condition of the driveway as presented through testimony and exhibits at trial.

Injunctive relief may be granted to an adjoining landowner upon a proper showing that an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to that landowner. *Riha v. FirsTier Bank*, 248 Neb. 785, 539 N.W.2d 632 (1995). The Nebraska Supreme Court has not hesitated to award injunctions in cases involving the improper obstruction of surface waters when a party makes a proper showing of continuing and permanent injury. See, e.g., *Riha v. FirsTier Bank, supra*; *Romshek v. Osantowski, supra*; *Gruber v. County of Dawson*, 232 Neb. 1, 439 N.W.2d 446 (1989); *Town of Everett v. Teigeler*, 162 Neb. 769, 77 N.W.2d 467 (1956); *Pospisil v. Jessen*, 153 Neb. 346, 44 N.W.2d 600 (1950); *Andersen v. Town of Maple*, 151 Neb. 103, 36 N.W.2d 620 (1949); *Olson v. Roscoe*, 149 Neb. 189, 30 N.W.2d 664 (1948). In *Town of Everett v. Teigeler*, *supra*, the Nebraska Supreme Court specifically awarded an injunction for removal of a dike that made a road impassable during heavy rains.

Upon our de novo review of the evidence and giving proper weight to the district court's observations of harm to Smith-Dugan while visiting the property, we find that Smith-Dugan presented evidence of a continuing and permanent injury resulting from William's improper obstruction of surface waters flowing from parcel 2 to parcel 1 through natural drainageways. The district court did not err in issuing an injunction ordering William to remove the embankments blocking the natural drainageways. William's third and final assignment of error lacks merit.

CONCLUSION

Because we find that the surface waters flowing from parcel 2 to parcel 1 at the location of the gate and at a point approximately 100 to 200 feet south of the county road pass through natural drainageways, William was not entitled to defend against those surface waters by obstructing their flow onto parcel 1. And because Smith-Dugan presented evidence of a continuing and permanent injury resulting from William's diversion of surface waters, the district court properly issued an injunction ordering William to remove the embankments he built across the natural drainageways. Therefore, we affirm the decree of the district court.

AFFIRMED.